STATE OF MICHIGAN

COURT OF APPEALS

DELORES THOMAS,

Plaintiff-Appellee,

v

AMERITECH CORP., INC.,

Defendant-Appellant,

and

GORDON FOOD SERVICES,[1]

Defendant,

and

CANTEEN CORP., and BRYAN CASTLE,[2]

Defendants/Third-Party Plaintiffs,

and

EDDIE HOLLAND, JR.,

Third-Party Defendant.

UNPUBLISHED
July 31, 2001

No. 220806
Wayne Circuit Court
LC No. 96-611142-NI

Before: White, P.J., and Sawyer and Saad, JJ.

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[1] Gordon Food Services was dismissed from the appeal by stipulation. *Thomas v Ameritech Corp, Inc*, unpublished order of the Court of Appeals, entered May 12, 2000 (Docket No. 220806).

[2] Canteen Corp. and Bryan Castle were dismissed from the appeal by stipulation. *Thomas v Ameritech Corp, Inc*, unpublished order of the Court of Appeals, entered August 1, 2000 (Docket No. 220806).

PER CURIAM.

Defendant, Ameritech Corp, Inc. ("Ameritech"), appeals as of right an order for entry of judgment, taxation of costs, interest, and mediation sanctions. We affirm in part, reverse in part and remand.

On September 6, 1995, plaintiff was attempting to cross Second Avenue in Detroit when she was hit and seriously injured by a pick-up truck that was backing up on the one-way street. Plaintiff filed a complaint against several parties, including Ameritech, whose van was illegally parked in the street at the time of the accident. Plaintiff alleged that Ameritech's illegally parked van had caused her accident by blocking her vision of the pick-up truck that hit her.

The case mediated for $37,500 in favor of plaintiff against Ameritech. The parties rejected the mediation evaluation. At the jury trial, the trial court indicated that Ameritech had filed a motion for directed verdict, but indicated that it would decide the motion at a later time. The jury found that Ameritech had been negligent and awarded plaintiff $108,000 in damages, which was reduced to $27,000 because of plaintiff's seventy-five percent comparative negligence. The trial court never decided Ameritech's motion for directed verdict. The trial court subsequently entered an order awarding plaintiff $10,929.81 in costs, $41,403.23 in mediation sanctions, and a judgment in the amount of $30,901.90[3] plus interest.

On appeal, Ameritech argues that the trial court erred in failing to grant its motion for directed verdict on the issue of proximate cause. As a preliminary matter, plaintiff argues that Ameritech did not preserve this issue for appeal because it did not object to the trial court's failure to decide Ameritech's motion. Generally, appellate review is limited to issues decided by the trial court. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). An issue that was not decided by the trial court is not properly before this Court but may be determined on remand. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 326; 565 NW2d 915 (1997). This Court will not address an issue that was not decided below unless it is one of law for which all the necessary facts were presented. *Id.* In determining whether a directed verdict was appropriate, this Court reviews all evidence admitted until the time of the motion to determine whether a question of fact existed. *Tobin v Providence Hosp*, 244 Mich App 626, 651-652; 624 NW2d 548 (2001). The court may grant a motion for directed verdict only if the evidence fails to establish a claim as a matter of law. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). Although the trial court never ruled on Ameritech's motion, all the necessary facts were presented at trial and the grant of a directed verdict is a matter of law. *Id*. Therefore, this Court may review the issue despite the trial court's failure to address it.

Turning to Ameritech's argument, we find that Ameritech was not entitled to a directed verdict on the issue of proximate cause. In reviewing a trial court's ruling on a motion for directed verdict, this Court reviews all evidence admitted until the time of the motion to determine whether a question of fact existed. *Tobin, supra* at 651-652. Proximate cause is an issue for the court when the facts are not in dispute and reasonable minds could not differ about

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[3] This amount reflected an additur granted by the trial court, which is not challenged on appeal.

applying the legal concept of proximate cause to those facts. *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995). This Court considers the evidence in the light most favorable to the nonmoving party. *Tobin, supra* at 652. When the evidence could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury. *Id.* Directed verdicts are not favored in negligence cases. *Id.* A grant or denial of a motion for directed verdict is reviewed de novo on appeal. *Id.* at 642.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Proving causation actually entails proof of both cause in fact and proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

Proximate cause is defined as follows:

> Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. To find proximate cause, it must be determined that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. [*Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999).]

When a number of factors contribute to produce an injury, one actor's negligence will not be considered a proximate cause of harm unless it was a substantial factor in producing the injury. *Hagerman v Gencorp Automotive*, 457 Mich 720, 737; 579 NW2d 347 (1998). Factors to be considered in determining whether the negligence is a substantial factor are:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
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> (b) whether the actor's conduct had created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
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> (c) the lapse of time. [*Poe v City of Detroit*, 179 Mich App 564, 576-577; 446 NW2d 523 (1989), citing 2 Restatement Torts, 2d, § 433, p 432.]

An intervening cause may relieve a defendant from liability. *Meek v Dep't of Transportation*, 240 Mich App 105, 120; 610 NW2d 250 (2000). An intervening cause is one which actively operates to produce harm to another after the negligence of the defendant. *Id.* An intervening cause is not a superseding cause if it was reasonably foreseeable. *Id.* Where the defendant's negligence consisted of enhancing the likelihood that the intervening cause would occur or consisted of failure to protect the plaintiff against the risk that occurred, the intervening cause is reasonably foreseeable. *Id.* at 120-121.

Ameritech argues that no reasonable juror could have found that its van proximately caused plaintiff's accident because the van was not a substantial factor in causing plaintiff's injury and plaintiff's failure to look to her right and the pick-up truck driver's negligence were superseding causes of the accident. We disagree. Plaintiff was attempting to cross Second Avenue, which is a one-way street. To plaintiff's right, she saw a "great big green truck" standing in the street away from the curb at mid-block. She also saw two vans parked in front of her with enough room between them for two or three people to walk through. The vans were taller than plaintiff, had no windows, and could not be seen through. The vans were illegally parked in a "no parking" area. Although these vans were illegally parked, it was common for vehicles to illegally park on Second Avenue and it was uncommon for the police to ticket these vehicles. The van on plaintiff's right belonged to Ameritech. The van on plaintiff's left belonged to Canteen Corp.

Instead of crossing the street at the crosswalk or in the elevated walkway, plaintiff jaywalked across the street at mid-block where there was not a crosswalk, but where people often crossed. Plaintiff walked into the street between the two vans and looked left, in the direction of oncoming traffic. She did not look right, toward the direction of the pick-up truck. Plaintiff indicated that she did not look right because Ameritech's van was blocking her view and she was concerned with the traffic coming from the other direction. After looking around the van to her left to check for traffic, plaintiff stepped into the street and was run over by the green pick-up truck, which was backing up.

Because of the appliances in the bed of the pick-up truck, the driver of the truck could not use his rear-view mirror to see out of his back window. Investigating Officer Robert Grohola testified that, when he got inside the truck, "I couldn't see alongside the parked cars. I wouldn't have been able to see anybody step out." Dr. Lorna Middendorf, a human factors psychologist, testified that somebody driving the truck and looking in the rear-view mirror would not have seen plaintiff because Ameritech's van would have blocked the driver's view of her. Additionally, Officer Grohola originally testified that Ameritech's van may have obstructed plaintiff's vision and contributed to the accident. On cross-examination, however, Officer Grohola admitted that Ameritech's van could not have obstructed plaintiff's view because she did not look to her right before crossing the street. Dr. Middendorf testified that plaintiff's view of the approaching truck to the right "was effectively blocked without her clearing the van that was parked ahead of her, the Ameritech van." She testified that "the placement of that [Ameritech] van was a significant contributor to the injury event." Dr. Middendorf further testified that plaintiff acted reasonably and as cautiously and carefully as she could have acted under the circumstances.

Ameritech cites *Poe, supra*, in support of its argument that its van could not have been a proximate cause of the accident and that there were superseding causes that relieve Ameritech of liability. In *Poe*, this Court determined that the driver of a bus had not violated a statute, enforceable ordinance, or the Department of Transportation regulations by stopping in a "no parking" zone. *Poe, supra* at 574-575. Therefore, the plaintiff failed to prove that the defendants violated any standard of care owed to the plaintiff and the trial court erred by failing to grant the defendants' motion for directed verdict on the question of duty. *Id.* at 569. In dictum, this Court stated that the plaintiff had failed to show that the defendants' bus was the proximate cause of the accident. *Id.* at 576. This Court stated that it is obvious that a bus will obstruct the view of

pedestrians and motor vehicles on the highway and that, unless acted upon by forces for which the bus driver is not responsible, this obstruction is harmless. *Id.* This Court concluded that the bus driver's actions were not a substantial factor in causing the accident and the bus driver's act of parking the bus at the curb was not a proximate cause of the accident, as a matter of law. *Id.* Instead, the accident was caused by the intervening, independent negligence of the plaintiff and the driver of the automobile that hit the plaintiff. *Id.*

Although similar, *Poe* is factually distinguishable from the instant case. In the instant case, unlike the bus in *Poe*, Ameritech's van was illegally parked. Therefore, Ameritech did not create a harmless situation, as the standing bus did in *Poe*. A defendant who violates a statute by illegally parking in a "no parking" zone is negligent as a matter of law. *Bensinger v Happyland Shows, Inc*, 44 Mich App 696, 703; 205 NW2d 919 (1973). Ameritech created a situation that was potentially dangerous to pedestrians by illegally parking in a "no parking" zone. Therefore, reasonable jurors could have found that Ameritech's van was a substantial factor in plaintiff's accident. Furthermore, the negligence of the pick-up truck driver and plaintiff may have been intervening causes of plaintiff's accident, but were not, as a matter of law, superseding causes that relieved Ameritech of liability. Plaintiff's failure to look right before she crossed the street and her act of jaywalking across the street may have been part of the cause of her accident. Additionally, the pick-up truck driver's act of backing up on a one-way street and the fact that the load in his pick-up truck blocked his view out of his rearview mirror may have been part of the cause of plaintiff's accident. However, a reasonable juror could have found that it was foreseeable that Ameritech's act of illegally parking in a "no parking" zone in an area where it was common for pedestrians to cross the street could have obstructed the vision of pedestrians and drivers and enhanced the likelihood of an accident. Because a reasonable juror could find that it was reasonably foreseeable that Ameritech's negligence enhanced the likelihood of an accident, plaintiff's and the truck driver's intervening negligence were not superseding causes as a matter of law. Therefore, Ameritech was not entitled to a directed verdict on the issue of proximate cause.

Next, Ameritech argues that the trial court abused its discretion in its award of $41,403.23 in mediation sanctions to plaintiff. A trial court's decision to award mediation sanctions involves a question of law that is reviewed de novo. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). However, a trial court's decision regarding the amount of an award of mediation sanctions is reviewed for an abuse of discretion. *Id.* at 377. Similarly, a trial court's determination of the reasonableness of an attorney fee is reviewed for an abuse of discretion. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). An abuse of discretion is found only in extreme cases where the result is " 'so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Elia, supra* at 377, quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

Generally, a party that rejects a mediation evaluation is subject to sanctions if the party does not improve its position at trial. *Elia, supra* at 378. However, if the opposing party also rejected the award, that party is not entitled to collect mediation sanctions unless it improved its position.

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. [MCR 2.403(O)(1).]

A verdict is considered more favorable to the defendant if it is more than ten percent below the evaluation and more favorable to the plaintiff if it is more than ten percent above the evaluation. MCR 2.403(O)(3). Here, both sides rejected the evaluation, and plaintiff improved her position by the required ten percent.

First, Ameritech argues that the trial court erred in awarding plaintiff double recovery of the taxable costs in the mediation sanctions, when it had already awarded her the same taxable costs under MCR 2.625. We agree. In general, costs will be allowed to the prevailing party, unless prohibited by statute or by the court rules or unless the court directs otherwise. MCR 2.625(A)(1). Similarly, if a party rejects a mediation evaluation, it may be liable to pay the opposing party's "actual costs" under MCR 2.403(O)(1). "Actual costs" are costs taxable in any civil action and reasonable attorney fees for services necessitated by the rejection of the mediation evaluation. MCR 2.403(O)(6). The Supreme Court has held that, if the prevailing party has already been fully reimbursed for reasonable attorney fees, there are no "actual costs" remaining to be reimbursed under MCR 2.403. *McAuley v General Motors Corp*, 457 Mich 513, 523; 578 NW2d 282 (1998), overruled in part on other grounds *Rafferty v Markovitz*, 461 Mich 265, 272-273 n 6; 602 NW2d 367 (1999). Double recovery of attorney fees under two different authorities is not appropriate, even if the authorities advance different purposes. *Rafferty v Markovitz*, 461 Mich 265, 272-273 n 6; 602 NW2d 367 (1999) (overruling *Howard v Canteen Corp*, 192 Mich App 427; 481 NW2d 718 [1991], and repudiating dicta in *McAuley*, *supra* at 513, "that left open the possibility of recovering attorney fees under both a court rule and a statute where each attorney-fee provision serves an independent purpose"). Where a prevailing party has already been reimbursed for his reasonable attorney fees, there are no remaining "actual costs" remaining to be reimbursed under MCR 2.403(O). *McAuley*, *supra* at 523. However, if the prevailing party recovers less than a reasonable attorney fee under a statutory provision and there are actual costs remaining, an additional award under MCR 2.403(O) may be appropriate. *McAuley*, *supra* at 521.

In the instant case, plaintiff requested $10,929.81 in taxable costs. This included $10,354.06 in expert witness fees and $575.75 in lay witness fees. Additionally, plaintiff requested $41,403.23 in mediation sanctions. This $41,403.23 in mediation sanctions included $10,354.06 for the same expert witnesses, $575.75 for the same lay witnesses, $3,398.42 for investigation services, and $26,775.00 in attorney fees. The trial court granted plaintiff's request and awarded her $10,929.81 in taxable costs and $41,403.23 in mediation sanctions. Apparently, the trial court awarded the amounts requested by plaintiff and awarded her double recovery for her taxable costs. Although *McAuley* dealt with double recovery of attorney fees, the same reasoning applies in the instant case to taxable costs. Because plaintiff had already been reimbursed for her taxable costs, she should not be permitted to recover for these costs again, although she should still recover for her attorney fees and other "actual costs" under MCR 2.403(O) that she had not already recovered. Therefore, under *McAuley*, *supra*, and *Rafferty*,

supra, the trial court erred by awarding plaintiff double recovery of taxable costs. This case should be remanded to the trial court to reduce plaintiff's mediation sanctions by $10,929.81.[4]

Next, Ameritech argues that the trial court abused its discretion in determining that plaintiff's attorney fee was reasonable. We disagree. MCR 2.403(O)(6)(b) provides that actual costs imposed as mediation sanctions include "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." *Rafferty, supra* at 267.

> In determining a reasonable hourly or daily rate for purposes of the mediation rule, the lower court should utilize the empirical data contained in the Law Practice Survey as well as data contained in other reliable studies or surveys. Such data should be utilized and coordinated with the other relevant criteria such as the professional standing and experience of the attorney; the skill, time, and labor involved; the amount in question and the results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the professional relationship with the client. [*Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990).]

In the instant case, the trial court awarded plaintiff $225 per hour and $2,500 per day of the trial in attorney fees. This totaled $16,775 in hourly fees and $10,000 in daily trial fees. The trial court awarded plaintiff her requested attorney fees because it was satisfied that plaintiff's counsel had sufficient expertise to charge $225 per hour and $2,500 per day of a trial.[5] We find that the trial court's determination was not " 'so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Elia, supra* at 377, quoting *Alken-Ziegler, Inc, supra* at 227.

Next, Ameritech argues that the trial court abused its discretion in awarding plaintiff an hourly attorney fee in addition to a daily attorney fee for each day of the trial. Ameritech argues that these fees overlap and plaintiff should not be permitted a double recovery of these fees. We disagree. The trial court did not award plaintiff double recovery for the hourly rate and the daily rate, but awarded each amount separately. The trial court awarded plaintiff the $16,775 in hourly fees she had requested for depositions, trial preparation, and summary disposition motions. The other $10,000 awarded by the trial court was $2,500 per day for the four-day trial. This totaled $26,775 in attorney fees, which was included in the trial court's award of mediation sanctions. Because these fees did not overlap, as alleged by Ameritech, the trial court did not abuse its discretion in awarding part of the attorney fee based on an hourly rate and part of the attorney fee based on a daily rate.

Finally, Ameritech argues that the trial court abused its discretion in awarding plaintiff $41,403.23 in mediation sanctions because this amount was excessive, considering the slight

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[4] This would result in mediation sanctions of $30,473.42.

[5] The trial court did not discuss the factors listed in *Temple, supra,* but stated, "The Court's satisfied you have the expertise, counsel."

amount by which the verdict exceeded ten percent of the mediation evaluation and the amount of the verdict itself.[6] We disagree. The test for an abuse of discretion is very strict, and ofttimes elevates the standard of review to an " 'apparently insurmountable height.' " *Sparks v Sparks*, 440 Mich 141, 150-151; 485 NW2d 893 (1992), quoting *People v Talley*, 410 Mich 378, 398; 310 NW2d 809 (1981) (Levin, J., concurring), overruled on other grounds *People v Kaufman*, 457 Mich 266; 577 NW2d 466 (1998). Even if the verdict was favorable to plaintiff by only slightly more than the ten percent threshold, we find the trial court's imposition of mediation sanctions was not so high so as to rise to the level of an abuse of discretion.

We affirm in part, reverse in part and remand the trial court's order for entry of judgment, taxation of costs, interest, and mediation sanctions to the extent that it awards plaintiff double recovery of her taxable costs. We remand to the trial court for the limited purpose of entering a modified order that does not award plaintiff the same taxable costs twice.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad

[6] Defendant does not dispute that the verdict was more than ten percent of the mediation evaluation or that plaintiff was entitled to mediation sanctions.